A

VINCENT MANICKAM DAVID (SUING BY HIMSELF & AS ADMINISTRATOR OF THE ESTATE OF CATHERINE JEYA SELLAMAH, DECEASED) & ORS v. DR S HARI RAJAH & ANOR

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
B IDRUS HARUN JCA
MARY LIM JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1760-10-2015]
29 MARCH 2017

C ***TORT:*** *Negligence – Employer's duty of care – Private hospital – Patient of private hospital died as a result of doctor's negligence – Whether hospital owed duty of care towards patients – Applicable test – Whether question of control – Whether hospital in control of doctor – Whether hospital owed non-delegable duty of care – Whether hospital liable for doctor's negligence*

D ***TORT:*** *Negligence – Vicarious liability – Private hospital – Patient of private hospital died as a result of doctor's negligence – Whether hospital owed duty of care towards patients – Whether terms and conditions of agreement between doctor and hospital indicated special relationship – Whether doctor was in control of hospital – Whether vicarious liability of hospital established*

E ***TORT:*** *Damages – Negligence – Patient of private hospital died as a result of doctor's negligence – Claim for loss of support and interest on award of special damages – Whether ought to be allowed – Civil Law Act 1956, s. 7(3)(iv)(c)*

Catherine was admitted to the second respondent hospital upon a referral of
F one Dr K Ruby following a complaint of vomiting, diarrhoea and severe lower abdominal pain. She was examined by the first respondent, a consultant general surgeon, and an immediate surgery was performed on her. Catherine was later discharged but was readmitted for a similar complaint. She received further treatment but her condition worsened that she had to be
G transferred to the ICU, where she had a cardiac arrest and CPR was administered. Catherine was put on a respirator and started on cardiac support. Unfortunately, Catherine passed away in the hospital and the cause of death in the death certificate stated 'multiple organ failure - septicaemia, acute appendicitis - peritonitis'. Her husband and their children
H ('the appellants') sued for various damages arising from her death. The appellants' claim against the first respondent was allowed on the grounds that the first respondent was negligent in the managing of Catherine and in ensuring that she was properly examined and treated. However, the appellants' claim against the second respondent was dismissed. The trial judge also refused to make any award for loss of earning capacity, loss of
I support, pre-judgment interest and costs. Hence, the appeal herein in respect of the dismissal of the claim against the second respondent and against the

quantum of damages awarded. The appellants contended that when the first respondent was found negligent, the second respondent ought to have been found to be vicariously liable for the first respondent's negligence.

Held (allowing appeal)
Per Mary Lim JCA delivering the judgment of the court:

(1) The liability of a private hospital or institution offering healthcare to the paying public is not examined from whether the particular doctor or nursing staff involved in the claim is under the employment of the hospital. The law recognises that employers, authorities or entities such as the second respondent a private hospital, may nevertheless be and will remain vicariously liable for the acts of persons who are not in the ordinary typical or strict sense 'employees' but who are not in fact 'independent contractors' either. There are obvious advantages or 'incentives to independent contractor status' which makes it all the more important that the law properly categorises between employee and independent contractor. (para 31)

(2) In contracts of service, the 'master' not only can require the work to be done but how the work is to be done. This test necessarily examines the question of control. The test for determining whether the contractual arrangement between the two respondents was one for a contract of service or a contract for services by analysing the degree and extent of control had also been found to be in itself indecisive and inadequate especially when it comes to professionals with some particular skill and experience. In such cases, 'there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test.' (paras 37 & 38)

(3) There is no 'single or universal test' that determines the existence of an employer/employee relationship although the 'multiple test' is advocated as 'the more modern approach'. In the multiple test, 'all aspects of the relationship are to be assessed and the assessment itself is seen as a complex undertaking. In essence, some of the case law has underlined the need to identify the economic reality of a given relationship'. The question of whether a private hospital is vicariously liable for negligence of its doctors, consultants or nurses, that is, the tortfeasor, is to be determined by investigating and evaluating whether such persons are truly independent contractors or they are, for all intents and purposes, still employees or in a special relationship with the hospital. (paras 40 & 50)

(4) The terms and conditions in the agreement between the respondents indicated the existence of a special relationship between the respondents. The picture emerged of a skilled and professional medical

practitioner in the person of the first respondent who is not truly independent of the second respondent. The terms and conditions showed that the second respondent remained always in control of the first respondent. Clearly, the first respondent was not at all an independent contractor. There existed a special relationship between the two respondents to establish vicarious liability. The second respondent was not a mere landlord tenanting the suite to the first respondent and being paid monthly rentals. (paras 61 & 62)

(5) Pursuant to the Private Healthcare Facilities and Services Act 1998, the second respondent hospital is more appropriately described as a healthcare facility. Hence, in law, the second respondent was not a mere building or an ordinary company incorporated under the Companies Act 1965; or even a landlord. It is a healthcare facility where healthcare services regulated by and under the law, were provided to members of the public and to persons such as Catherine and the appellants. The core business that the second respondent proffered could only be rendered through healthcare professionals such as the first respondent, the medical officer and the nurses in the instant appeal. Under such circumstances, the second respondent owed a duty of care to the clients or patients with whom the second respondent accepted and agreed to provide healthcare. (paras 71 & 73)

(6) The second respondent, as a hospital or healthcare facility or services provider, owed a duty of care to all the patients who attend or are admitted into its care. It is a non-delegable duty of care. By admitting Catherine into its facility to be provided the services of the first respondent and the other attending nurses which the first respondent was obligated and mandated to use, the second respondent had assumed a positive duty of care to protect Catherine from harm and risk of injury. Hence, when the first respondent breached that duty and injury or harm was caused to Catherine, the second respondent remained liable. (paras 76 & 88)

(7) Compensation for loss of support is compensation for the support given by Catherine in the form of money or money's worth. In computing the loss of support, s. 7(3)(iv)(c) of the Civil Law Act 1956 requires the deduction of the amount that Catherine spent on herself, that sum being her living expenses. Catherine's living expenses was a sum of RM2,000 per month leaving the multiplicand at the sum of RM10,808.05. With a multiplier of four years, the total loss of support is RM518,786.40. To this sum, a tax deduction of 20% ought to be made. This sum was awarded together with interest at the rate of 5% per annum from the date of judgment to the date of realisation. Further, the trial court ought to have ordered interest on the award of special damages given that this compensation was in effect for out of pocket expenses or expenses

already expended by the appellants. Consequently, interest at the rate of 4% per annum was ordered to be imposed on the sum of RM180,720.35 from the date of Catherine's death to the date of judgment. (paras 95 & 97)

Bahasa Malaysia *Headnotes*

Catherine dimasukkan ke hospital responden kedua selepas dirujuk oleh Dr K Ruby setelah mengadu mengalami muntah-muntah, cirit-birit dan sakit teruk di bahagian bawah abdomen. Dia diperiksa oleh responden pertama, seorang pakar am bedah perunding, dan pembedahan segera dilakukan. Catherine kemudiannya dibenarkan pulang tetapi dimasukkan semula dengan aduan yang serupa. Dia menerima rawatan lanjut tetapi keadaannya merosot sehingga dia dipindahkan ke ICU, di mana dia mengalami kardium terhenti dan diberikan CPR. Catherine diberikan bantuan respirator dan rawatan awal pemulihan kardiopulmonary dan bantuan jantung diberikan. Malangnya, Catherine meninggal dunia di hospital dan dalam sijil kematiannya, sebab kematian dinyatakan sebagai 'multiple organ failure - septicaemia, acute appendicitis - peritonitis'. Suami dan anak-anak mereka ('perayu-perayu') menyaman untuk berbagai ganti rugi berikutan kematiannya. Tuntutan perayu-perayu terhadap responden pertama dibenarkan atas alasan responden pertama cuai dalam menguruskan Catherine dan memastikan dia diperiksa dan dirawat dengan sewajarnya. Walau bagaimanapun, tuntutan perayu-perayu terhadap responden kedua ditolak. Hakim bicara juga enggan memberikan apa-apa award bagi kehilangan keupayaan pendapatan, kehilangan sokongan, faedah pra-penghakiman dan kos. Oleh itu, rayuan di sini berkaitan dengan penolakan tuntutan terhadap responden kedua dan terhadap kuantum ganti rugi yang diawardkan. Perayu-perayu menghujahkan apabila responden pertama didapati cuai, responden kedua wajar didapati bertanggungan secara vikarius atas kecuaiannya.

Diputuskan (membenarkan rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Liabiliti hospital swasta atau institusi yang menawarkan kemudahan jagaan kesihatan kepada umum secara berbayar tidak dinilai daripada sama ada seseorang doktor atau kakitangan penjagaan terlibat dalam tuntutan tersebut adalah bawah pekerjaan dengan hospital itu. Undang-undang mengiktiraf pekerja-pekerja, pihak-pihak berkuasa atau entiti-entiti seperti hospital swasta responden kedua boleh juga dan akan kekal bertanggungan secara vikarius bagi tindakan seseorang yang bukan secara umumnya atau dalam erti kata ketat 'pekerja' malahan juga seseorang yang bukan 'kontraktor persendirian'. Terdapat faedah jelas atau 'insentif terhadap status kontraktor persendirian' yang menjadikannya lebih penting bagi undang-undang mengkategorikan antara pekerja dan kontraktor persendirian.

(2) Bagi kontrak perkhidmatan, 'ketua' bukan hanya boleh meminta sesuatu pekerjaan dilakukan malah bagaimana ia perlu dilakukan. Ujian ini sewajarnya menilai persoalan kawalan. Ujian untuk menentukan sama ada urusan kontrak antara kedua-dua responden adalah kontrak perkhidmatan atau kontrak bagi perkhidmatan dengan menganalisis takat dan sejauh mana kawalan juga didapati tidak tetap dan tidak mencukupi khususnya apabila ia berkait dengan profesional serta kemahiran dan pengalaman tertentu. Dalam keadaan demikian, 'tiada persoalan majikan memberitahu bagaimana kerja perlu dilakukan; dengan itu ketiadaan kawalan dan arahan dalam keadaan tersebut tidak boleh, jika ada, digunakan sebagai ujian'.

(3) Pada dasarnya, tiada 'satu ujian atau ujian sejagat' yang menentukan kewujudan hubungan majikan/pekerja walaupun 'ujian pelbagai' disarankan sebagai 'pendekatan yang lebih moden'. Dalam ujian pelbagai 'kesemua aspek hubungan perlu dinilai dan penilaian itu sendiri dilihat sebagai usaha yang kompleks. Secara inti patinya, beberapa kes telah menekankan keperluan untuk mengenal pasti realiti hubungan tertentu'. Persoalan sama ada hospital swasta bertanggungan secara vikarius bagi kecuaian doktor-doktornya, pakar runding atau jururawat, iaitu, pelaku salah, perlu diputuskan dengan menyiasat dan menilai sama ada orang tersebut sebenarnya kontraktor persendirian atau mereka adalah, bagi setiap niat dan tujuan, masih pekerja atau mempunyai hubungan khas dengan hospital tersebut.

(4) Terma-terma dan syarat-syarat dalam perjanjian antara responden-responden menunjukkan kewujudan hubungan khas antara responden-responden. Gambaran yang timbul tentang responden pertama adalah sebagai pengamal perubatan dengan kemahiran dan profesional yang bukan sebenarnya bebas daripada responden kedua. Terma-terma dan syarat-syarat tersebut menunjukkan bahawa responden kedua sentiasa kekal mempunyai kawalan terhadap responden pertama. Jelas, responden pertama sememangnya bukan kontraktor persendirian. Wujud hubungan khas antara kedua-dua responden untuk mewujudkan liabiliti vikarius. Responden kedua bukan semata-mata tuan tanah yang menyewakan bilik tersebut kepada responden pertama dan dibayar sewa bulanan.

(5) Menurut Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998, hospital responden kedua lebih sesuai dinyatakan sebagai kemudahan jagaan kesihatan. Dengan itu, dari segi undang-undang, responden kedua bukan semata-mata bangunan atau syarikat yang ditubuhkan di bawah Akta Syarikat 1965; atau tuan tanah. Ia adalah kemudahan jagaan kesihatan di mana perkhidmatan jagaan kesihatan dikawal oleh dan di bawah undang-undang, diperuntukkan kepada awam dan kepada sesiapa sahaja seperti Catherine dan perayu-perayu. Teras perniagaan yang ditawarkan oleh responden kedua hanya boleh

diberikan melalui profesional-profesional jagaan kesihatan seperti responden pertama, pegawai perubatan dan jururawat-jururawat dalam rayuan ini. Dalam keadaan sedemikian, responden kedua mempunyai kewajipan berjaga-jaga terhadap pelanggan atau pesakit yang terhadapnya responden kedua menerima dan bersetuju memberikan jagaan kesihatan.

(6) Responden kedua, sebagai hospital atau kemudahan jagaan kesihatan atau pemberi kemudahan, mempunyai kewajipan berjaga-jaga terhadap kesemua pesakit yang hadir atau diterima masuk dalam jagaannya. Ia adalah kewajipan berjaga-jaga yang tidak boleh diwakilkan. Dengan menerima masuk Catherine ke dalam kemudahannya untuk diberikan perkhidmatan, responden pertama dan jururawat lain yang merawatnya seperti yang diwajibkan dan dimandatkan kepada responden pertama untuk digunakan, responden kedua menerima kewajipan berjaga-jaga positif untuk melindungi Catherine daripada bahaya dan risiko kecederaan. Oleh itu, apabila responden pertama melanggar kewajipan itu dan kecederaan atau bahaya berlaku kepada Catherine, responden kedua kekal bertanggungan.

(7) Pampasan bagi kehilangan sokongan adalah pampasan bagi sokongan yang diberikan oleh Catherine dalam bentuk wang atau yang bernilai. Dalam mengira kehilangan sokongan, s. 7(3)(iv)(c) Akta Undang-Undang Sivil 1956 memerlukan penolakan jumlah yang mana Catherine belanjakan bagi dirinya sendiri jumlah tersebut adalah perbelanjaan sara hidupnya. Perbelanjaan sara hidup Catherine berjumlah RM2,000 sebulan menjadikan multiplicand berjumlah RM10,808.05. Dengan pengganda empat tahun, jumlah kehilangan sokongan adalah RM518,768.40. Pemotongan cukai 20% perlu dilakukan bagi jumlah ini. Jumlah ini diawardkan bersama-sama dengan faedah pada kadar 5% setahun dari tarikh penghakiman sehingga tarikh pembayaran. Selanjutnya, mahkamah bicara sepatutnya memerintahkan faedah atas award ganti rugi khas memandangkan pampasan ini adalah sebenarnya bagi perbelanjaan semasa dan yang telah dibelanjakan oleh perayu-perayu. Dengan itu, faedah pada kadar 4% setahun diperintahkan dikenakan terhadap jumlah RM180,720.35 dari tarikh kematian Catherine sehingga tarikh penghakiman.

Case(s) referred to:

Bank voor Handel en Scheepvaart NV v. Slatford [1953] 1 QB 248 ***(refd)***
Cassidy v. Ministry of Health [1951] 2 KB 343 ***(refd)***
Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & Ors [2011] 1 LNS 33 HC ***(refd)***
Collins v. Hertfordshire County Council [1947] 1 KB 598 ***(refd)***
Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2015] 1 LNS 1476 CA ***(refd)***
Dr Wong Wai Ping & Anor v. Woon Lin Sing & Ors [1999] 6 CLJ 23 HC ***(refd)***
Edwards v. Bairstow [1956] AC 14 ***(refd)***

Evans v. Liverpool Corporation [1906] 1 KB 160 ***(refd)***
Ferguson v. Dawson & Partners (Contractors) Ltd [1976] 1 WLR 1213 ***(refd)***
Foong Yeen Keng v. Assunta Hospital (M) Sdn Bhd & Anor [2006] 1 CLJ 608 HC ***(refd)***
Gold v. Essex County Council [1942] 2 KB 293 ***(refd)***
Hillyer v. Governors of St Bartholomew's Hospital [1909] 2 KB 820 ***(refd)***
Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 FC ***(refd)***
Kondis v. State Transport Authority (1984) 55 ALR 225 ***(refd)***
Lee Ting Sang v. Chung Chi-Keung & Another [1990] 2 AC 374 ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Market Investigations v. Minister of Social Security [1969] 2 QB 173 ***(refd)***
Marshall v. Lindsey County Council [1935] 1 KB 516 ***(refd)***
Montreal v. Montreal Locomotive Works Ltd [1947] 1 DLR 161 ***(refd)***
Paul William Lane v. The Shire Roofing Company (Oxford) Limited [1995] IRLR 493 ***(refd)***
Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2 QB 497 ***(refd)***
Roe v. Minister of Health [1954] 2 QB 66 ***(refd)***
Soo Cheng Lin v. Dr Kok Choong Seng & Anor And Another Appeal [2016] 8 CLJ 368 CA ***(refd)***
Strangeways-Lesmere v. Clayton [1936] 2 KB 11 ***(refd)***
Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor [2006] 5 CLJ 175 HC ***(refd)***
Various Claimants v. Catholic Child Welfare Society & Others [2013] 1 All ER 670 ***(refd)***
Wilsher v. Essex AHA [1987] QB 730 ***(refd)***
Woodland v. Essex County Council [2013] 1 All ER 670 ***(refd)***
Woodland v. Essex County Council [2014] 1 All ER 482 ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***
Wu Siew Yong v. Pulau Pinang Clinic Sdn Bhd & Anor [2011] 1 CLJ 255 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(3)(iv)(c)
Private Healthcare Facilities and Services Act 1998, s. 2

Other source(s) referred to:
Clerk & Lindsell on Torts, 21st edn, p 380, para 6-02
Jackson & Powell on Professional Negligence, 5th edn, 2002, paras 12-250
Andrew Grubb on Medical Law, 3rd edn, 2000, p 298

For the appellants - Manmohan S Dhillon & Karthigaibalan Kanthabalan; M/s PS Ranjan & Co
For the 1st respondent - Sreether Shanmuga Sundaram; M/s Murali B Pillai & Assocs
For the 2nd respondent - Tharumarajah Thiagarajah & Denis KW Wan; M/s Azim, Tunku Farik & Wong

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-96-03-2014 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim JCA:

[1] The appellants' claim of negligence against the first respondent who was the surgeon who attended to the late Catherine Jeya Sellamah was allowed with costs but their claims against the second respondent, the hospital to which the deceased was admitted and treated was dismissed. The appellants' appeal before us is in respect of that dismissal and against the quantum of damages awarded. There is no appeal by the first respondent and neither are there cross-appeals by any of the respondents. The issue of liability in respect of the first respondent therefore does not arise.

[2] Although there were originally seven defendants, the appellants withdrew their actions against five of them, leaving the present two respondents that we see before us. The first appellant is the lawful husband of the late Catherine while the other two appellants are their children.

[3] This is what happened to Catherine. She was admitted to the second respondent hospital on 2 March 2012 upon referral by Dr K Ruby of Klinik dan Surgeri Sri Damansara. The referral note is addressed to the "Surgeon on call (Dr Hari Rajah), Casualty, DSH". Catherine complained of vomiting, diarrhoea and severe lower abdominal pain of a two-day duration. She had already been seen by another GP in Rawang prior to the referral by Dr Ruby. At Damansara Specialist Hospital (second respondent), she was examined by the first respondent, a consultant general surgeon who then advised immediate surgery. The first respondent performed a laparotomy and appendectomy on the same day. Catherine stayed at the hospital for several days and was discharged on 6 March 2012.

[4] On 11 March 2012, she was readmitted following a similar complaint of vomiting, diarrhoea and lower abdominal pain. At the A&E Department, she was first seen by the medical officer and later reassessed by the first respondent, also at A&E. The first respondent diagnosed that Catherine had a paralytic ileus that was causing her abdominal distension and the possibility of collection of residual pus in the abdomen which accounted for the high white cell count. The first respondent immediately started Catherine on antibiotics. However, her condition worsened and the first respondent then instructed that Catherine be transferred from the ward to ICU. At the ICU, Catherine had a cardiac arrest. CPR was administered and although she recovered, she was put on a respirator and started on cardiac support. Unfortunately, she passed away at the hospital on 21 March 2012. The cause of death in the death certificate states: "multiple organ failure – septicaemia acute appendicitis – peritonitis". Her husband and their children sued for various damages arising from her death.

[5] After a full trial, the learned judge found the first respondent fully liable. According to the learned judge, the first respondent was negligent in the managing of Catherine and in ensuring that she was properly examined and treated. In the learned judge's view, had the first respondent exercised reasonable skill in keeping with correct medical practice in his treatment and examination of Catherine, the complications that she suffered could have been avoided by proper care, skill and diligence:

> Berdasarkan pada keterangan yang dikemukakan, Mahkamah dapati Defendan Pertama telah cuai dalam menguruskan Catherine bagi mendapat rawatan dan pemeriksaan yang sewajarnya bagi komplikasi-komplikasi yang beliau alami yang mana dari segi perubatan jika rawatan dan pemeriksaan yang sewajarnya mengikut kepakaran Defendan Pertama diberikan kepada Catherine, maka semua komplikasi yang dialami oleh Catherine dapat dielakkan dengan melaksanakan penjagaan, kemahiran dan ketekunan yang sewajarnya mengikut amalan perubatan yang betul."

[6] Consequently, the trial court awarded compensation as follow:

(i)	General damages and loss of amenities	RM100,000
(ii)	Loss of contribution	nil
(iii)	Loss of earning capacity	nil
(iv)	Bereavement	RM10,000
(v)	Medical expenses	RM150,961.55
(vi)	Travelling expenses	RM2,200
(vii)	Funeral expenses	RM24,547.80
(viii)	Loss of support	nil
(ix)	Letters of administration	RM1,011
(x)	Medical reports	RM2,000

[7] Interest at the rate of 5% per annum from the date of judgment to the date of realisation was awarded on the above sums. However, no pre-judgment interest was awarded. The appeal is against the refusal of the learned judge to make any award for loss of earning capacity, loss of support, pre-judgment interest and costs.

[8] There is no appeal against the finding of liability against the first respondent; the appeal before us is only in respect of the refusal of certain heads of damage and the dismissal of the claim against the second respondent.

[9] Upon careful deliberations of the submissions of all learned counsel, and after considering the reasons set out in the grounds of judgment, we allowed the appeal. These are our full grounds.

Liability Of The Second Respondent

[10] The specific allegations against the second respondent can be found at paras. 11, 13 to 18, 27, 27.32 to 27.40 and 29 of the statement of claim. Each of these pleas must be examined to appreciate just how and why the appellants say that the learned judge was erroneous in dismissing its claim against the second respondent.

[11] In the first introductory paragraphs, the appellants described the second respondent in the following terms, that the second respondent:

(i) owns and manages a private hospital at which the first respondent practices;

(ii) together with the first respondent, it works in the delivery of healthcare services to members of the public; that it held out that the first respondent is a member, partner and/or servant or agent of its establishment;

(iii) holds and has held out to the public that the hospital provides a diverse range of medical, surgical, nursing, pharmaceutical, laboratory, imaging and other healthcare services;

(iv) employs various consultants, specialists, medical officers, *locum tenentes*, pharmacists, laboratory personnel, medical technicians, radiographers, physiotherapists, dieticians, nutritionists, and other healthcare personnel to work at its hospital;

(v) it has a business and organisational relationship amongst the first respondent (and other defendants originally sued) which brings about financial gain to them when providing healthcare services to patients such as Catherine;

(vi) engages in a common enterprise in providing healthcare services to members of the public;

(vii) as a healthcare provider, the second respondent owes a duty of good faith and candour so as to act in the best interest of patients and to give them adequate information and advice in regard to their medical condition;

(viii) has a practice where the doctors including the first respondent have billing targets in regards to the services rendered to patients at the hospital.

[12] At para. 27, the appellants allege that Catherine's death was an avoidable event, avoidable with the exercise of due care, skill and diligence in accordance with proper medical practice and as required under the terms of the contract between the parties. The appellants further allege that the second respondent and its servants or agents had by their negligence and breach of contractual duties, caused or materially contributed to the pain and

suffering and loss of amenities endured by Catherine and to her death, and to the loss and damage suffered by Catherine, her estate and by the appellants. Specifically, at para. 27.32, the appellants set out the particulars of negligence of the second respondent:

> Particulars Of Negligence Of The Seventh Defendant And Its Servants And Agents
>
> 27.32 failed to engage doctors, nurses and other healthcare personnel with sufficient qualifications, training and experience;
>
> 27.33 failed to have or provide the necessary facilities for the monitoring and observations of the patient's condition, investigations and tests, intensive care, high dependency care and the treatment of dangerously ill patients;
>
> 27.34 failed to have in place a proper and effective system for the management and treatment of patients undergoing or who had undergone surgery;
>
> 27.35 failed to have in place a proper and effective system for attending without delay to patients who, after discharge, seek advice and treatment for post-operation complications;
>
> 27.36 failed to have in place a proper and effective system for giving advice and information to patients in the post-operative period and upon their discharge from the hospital;
>
> 27.37 alternatively, failed to follow any or all of the aforesaid systems;
>
> 27.38 the nurses and other healthcare personnel engaged by the 7th defendant had failed to detect, act upon and report in sufficient detail and without delay to the doctors and specialists the deterioration in the patient's condition;
>
> 27.39 the nurses engaged by the 7th defendant had allowed the deterioration in the patient's condition, including such matters as the prolonged hypotension, to go unnoticed and untreated for too long; and
>
> 27.40 failed to provide any or any proper financial counselling to the plaintiffs regarding the treatment and management of the patient's condition.

[13] Finally, at para. 29, the appellants plead that the second respondent is both vicariously liable for the negligence of the first respondent and that of its servants and agents; and that it is also directly liable for its own negligence.

[14] In summary, the appellants had alleged that the second respondent is:

(i) vicariously liable for the negligence of the first respondent;

(ii) vicariously liable for the negligence of its employees, the medical officer and the nurses; and

(iii) directly liable for organisational and system failures.

[15] The appellants contended that when the first respondent was found negligent, the second respondent ought to have been found to be vicariously liable for his negligence. Two principal reasons were articulated before the trial judge. First, it was contended that there was no longer room for the defence of independent contractor in view of the development of this area of the law, and also because the second respondent itself had sought contribution or indemnity from the first respondent in the event that it was found to be liable. The second respondent had further required the first respondent to obtain professional indemnity insurance. These two actions show that the second respondent fully recognised that it may be held liable for the negligence of the first respondent. Since the first respondent has been found to be negligent, the second respondent must be held liable vicariously for the first respondent.

[16] It was the further argument of the appellants that the second respondent ought to have been found to be vicariously liable for the negligence of the medical officer and the nurses who *inter alia*:

(i) at the first admission, delayed in sending the specimen of pus (taken from Catherine) to the laboratory which then adversely affected the C&S (culture and sensitivity) test results;

(ii) at the second admission, failed to get some other doctor to attend to Catherine when the first respondent failed to attend to Catherine at the material time of the second admission despite the nurses' several efforts in raising him over the telephone; and

(iii) took too long to intubate Catherine when she had a cardiac arrest; the procedure allegedly would have taken inside 30 seconds under skilled hands; the nurses took 12 minutes and this had drastic consequences on Catherine's condition.

[17] In further support of its allegation that the second respondent was directly liable, the appellants claimed that there was undisputed expert evidence that Catherine should never have been admitted to the ward. Instead, given her condition on the second admission, she should have been admitted to either the High Dependency Unit (HDU) or the Intensive Care Unit (ICU) where she would have received closer monitoring. The second respondent ought to have recognised that Catherine was not fit to be left in the ward. The failure to do so is said to be evidence of organisational and system failure on the second respondent's part.

[18] It was also the appellants' claim that the second respondent owed a direct non-delegable duty of care to their patients, including Catherine. The second respondent's liability is reflected in exh. D11, wherein the second respondent had *inter alia* said:

> **WORD OF ASSURANCE**
>
> The management and staff of KPJ Damansara Specialist Hospital (KPJ DSH) would like to extend a warm welcome to you, our very special guest to one of the premier hospitals in Malaysia and South East Asia.
>
> Our hospital with our dedicated team of consultant staffs provide the very best of comprehensive medical care for your well-being and treatment, making this a place of healing and comfort to you.
>
> The facilities are centred on you and designed to facilitate the task of helping you to gain renewed health as soon as possible. It is our duty and certainly our pleasure to ensure that you have the peace, serenity and security, which are all necessary for a complete and pleasant recovery.
>
> HOSPITAL'S BACKGROUND
>
> KPJ Damansara Specialist Hospital (DSH) is the 8th hospital under the flagship of the KPJ Healthcare Bhd, the largest healthcare group in the Malaysian and South East Asian region which has under its wings, 19 reputable and strategically located hospitals in Malaysia and 2 in Indonesia.
>
> By virtue of this symbiotic partnership and cohesive network of specialists, the KPJ Group as an entity is equipped to render highly comprehensive medical assistance and specialist care to all. Patients can tap into the wealth of expertise, experience and technology.

[19] The appellants claimed that the second respondent was liable directly for what happened to Catherine due to the organisational and system failure of the second respondent in not ensuring that Catherine was admitted to the High Dependency Unit (HDU) or the Intensive Care Unit (ICU). Had she been so admitted, she would have received closer monitoring and her death could have been avoided. The second respondent and the doctors including the first respondent had worked together in providing healthcare to Catherine. Any contractual or commercial arrangement between the respondents had no bearing on that duty. That arrangement in any case was not made known to the appellants at the material time. The second respondent's chief executive officer Zaharah Osman (SD8) had testified that the doctors and specialists were part of the hospital's team providing that healthcare. She had also admitted that the private independent contractor agreement between the hospital and the first respondent was not disclosed to the patient nor was it mentioned in the hospital's information leaflets.

[20] The second respondent had denied liability for the negligence of the first respondent principally on the ground that he was an independent contractor under a contract for service for whom the second respondent is

not responsible. Its responsibilities as a private hospital only entailed the second respondent providing the necessary facilities, equipment and nurses to enable its consultants and specialists such as the first respondent to carry on their practice at the second respondent hospital. All diagnosis, treatment, management and care of Catherine was entirely the responsibility of the first respondent, to whom Catherine first sought treatment on 2 March 2012. As for the nurses, the second respondent claimed that they were not negligent and that they had attended to Catherine according to the instructions of the first respondent.

[21] The learned judge dismissed the claim against the second respondent in all three respects. Specifically, the learned judge found that the second respondent was not liable for the negligence of the first respondent as he was an independent contractor. This was evidenced by the contractual arrangements between the two respondents; the fact that the first respondent was not an employee of the second respondent; and also based on the admission of the first respondent that he was fully responsible for the clinical treatment, care and management of Catherine.

[22] In relation to the nurses and the matters particularly identified as wanting on their part, the learned judge was of the view that although the nurses were employees of the second respondent, they were carrying out their responsibilities according to the first respondent's instructions at the material time in which case the second respondent could not be liable for them. In any case, the nurses were not in breach of their duties as they had always advised the first respondent on Catherine's condition; that the time taken to send the sample to the lab was accounted for and was in any event in accord with the general practice in both private and government hospitals as testified by SD2 and SD7 (Dr Navinbhai Patel and Dr Joseph Anthony Manavalan). The learned judge concluded that the appellants had failed to prove that the second respondent had breached any of its duties.

[23] Before us, the appellants took up the same submissions made at the High Court and further submitted that the learned judge's findings and conclusions were erroneous as only the first ground of failure in relation to the delay in sending the specimen of pus to the lab was considered. The other allegations were not considered; had those other allegations been considered, the learned judge would have found the second respondent both vicariously and directly responsible for Catherine's death. Learned counsel for the second respondent impressed upon us that there was no basis for disturbing the decision of the learned judge; that the second respondent cannot be vicariously or directly responsible for Catherine's death.

[24] With respect, we cannot agree with the submissions of the second respondent.

[25] Dealing first with the issue of vicarious liability and this is in two respects: in relation to the negligence of the first respondent, the other in relation to the negligence of the nurses and medical officer who attended to

Catherine. As pointed out earlier, the submissions of the appellants is that with the finding of negligence on the first respondent's part, the second respondent ought to have been found vicariously liable for his negligence. The learned judge ought to have abided with the recent developments on the law on independent contractors where hospitals such as the second respondent remain vicariously liable for the negligence of their doctors and consultants. The learned judge disagreed with the appellants.

[26] In coming to her decision that the second respondent was not vicariously liable for the negligence of the first respondent or even that of the nurses when acting on the instructions of the first respondent, the learned judge relied on the Federal Court's decision in *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409. In that case, the plaintiff was the owner of a nursery. The first defendant was licensed to operate a quarry of a natural limestone hill known as "Gunung Tunggal" on a plot of land adjacent to the plaintiff's nursery. After a heavy downpour and thunderstorm, a large slice of the hill collapsed onto and virtually destroying the plaintiff's entire nursery. The plaintiff sued *inter alia* the quarry operator and the landowner. The High Court found that the damage to the plaintiff's nursery was due to the operator's negligent quarrying activities. The High Court however, did not find the landowner liable for the negligence of the quarry operator. Amongst its reasons was because the landowner was not operator of the quarry. He had leased the land to the operator at the material time and therefore could not be its occupier.

[27] The Federal Court agreed with the High Court's decision but for different reasons. The Federal Court found no negligence based on the landowner's alternative plea of independent contractor, relying on unchallenged testimony from the quarry operator that the landowner did not participate in the operations of the quarry. Then, at para. 49, the Federal Court said:

> As an employer is not responsible for any tort committed by an independent contractor in the course of the execution of the works (which is the pleaded case of the 2nd defendant) unless there are evidence to indicate otherwise – see *Milligan v. Wedge* [1840] 12 A&E 737; *D & F Estates Ltd v. Church Commissioner of England* [1988] 3 WLR 368; and there being none in this case, the 2nd defendant cannot be held liable to the plaintiff for the negligence of the 1st defendant.

[28] James Foong J (as he then was) in *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor* [2006] 5 CLJ 175; [2006] 1 MLJ 57, 68 said that three requirements must be satisfied in order to establish vicarious liability:

> … First, there must be a wrongful, or tortuous action. Second, there must exists special relationship that is recognised by law between the person alleged to be viciously liable and the tortfeasor. Third, the tort is committed within the course of employment – *Law of Torts in Malaysia* (2nd Ed) by Norchaya Talib at p. 368.

[29] Justice Foong further discussed how "special relationship" may be established:

> [35] To ascertain whether such special relationship exists, the Courts have devised various tests. The first is the control test as laid down in *Short v. J & W Henderson Ltd* (1946) 62 TLR 427 at 429. Here the criteria are: first, the power of selection of the employer; second. Power in determining salary or other remuneration; third, power or right of the employer to control the method in which the work was done; fourth, power and right of the employer to terminate the employee's services.
>
> [36] Then, there is the organisational test. This is laid down in *Stevenson, Jordan & Harrison Ltd v. MacDonald & Evans* [1952] 1 TLR 101 at p 111. Here the Court examines the wrongdoer's work in relation to organisation set up by the party who is alleged to be vicariously liable for his action.
>
> [37] Finally, there seem to be a third test known as the multiple test adopted by the Courts as shown in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 which is said to be based on the common sense approach.
>
> [38] All in all, what … is necessary for the second plaintiff to establish in this case against the second defendant is … whether the second defendant has … control over the first defendant to create a form of special relationship that can cause the second defendant to be vicariously liable for the wrongdoing of the first defendant, if proven.

[30] On the facts in that case, Justice Foong found that there was no special relationship in order to attribute vicarious liability between the defendants, the attending doctor and the hospital to which the patient had been admitted.

[31] As can be seen from *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor*, the liability of a private hospital or institution offering health care to the paying public is not examined from whether the particular doctor or nursing staff involved in the claim is under the employment of the hospital. That may well be the first question to answer for if the doctor or nursing staff were the direct employees were employees of the private hospital, then the employer hospital surely must be responsible vicariously for the wrongs or negligence of such employees; as is generally the position for public hospitals. Rather, that issue of liability is examined by adopting a more realistic approach following a recognition of the way businesses and services are now arranged and provided. The law recognises that employers, authorities or entities such as the second respondent private hospital may nevertheless be and will remain vicariously liable for the acts of persons who are not your ordinary typical or strict sense "employees" but who are not in fact "independent contractors" either. There are obvious advantages or "incentives to independent contractor status" which makes it all the more important that the law properly categorises between employee and

independent contractor as was noted by Henry LJ in *Paul William Lane v. The Shire Roofing Company (Oxford) Limited* [1995] IRLR 493. Although that was a construction case, the principles are relevant to our present appeal.

[32] The claimant in *Paul William Lane* was a builder/roofer/carpenter who was self-employed. With that, he enjoyed certain fiscal status and he could advertise for work and when engaged by clients, would be responsible for estimating, buying materials and matters of that kind. He also had public liability insurance for his work but it was no longer valid by the time he teamed up with the respondent, a roofing contractor. Being a newly established company, the respondent did not have many long term employees. Instead, what it does is to advertise for men to carry out the contract after it has successfully secured it. The materials and equipment (ladders, scaffolds and trestles) for a particular job would be supplied by the respondent although in the instant case, the claimant brought his own personal roofing and carpentry tools. The claimant fell while doing some of the roofing work. He had no recollection of how the accident happened; he was found injured by the owners of the house where he was doing the re-tiling of the roof. He sued the respondent for breach of safety at his workplace.

[33] The trial judge found for the respondent concluding that the claimant was an independent contractor and not an employee for several reasons. First, the claimant *inter alia* worked without supervision with the respondent relying on the claimant to do so; second, there was no guarantee from the respondent that the claimant would continue to work for the respondent; third, there were no provisions for termination or dismissal even though both parties obviously anticipated that if further jobs were to arise, they would be given to the claimant. Because the claimant was an independent contractor, the respondent did not owe the claimant any duty of care and had no responsibility, both under statute and common law for the safety of the work done by the claimant. An independent contractor is responsible for his own safety.

[34] In allowing the appeal of the claimant, the Court of Appeal made two general remarks on the case authorities cited in support of the law on independent contractors. First, it observed that:

> The overall employment background is very different today (and was, though less so, in 1986) than it had been at the time when those cases were decided. First, for a variety of reasons, there are more self-employed and fewer in employment. There is a greater flexibility in employment, with more temporary and shared employment. Second, there are perceived advantages for both workman and employer in the relationship between them being that of independent contractor. From the workman's point of view, being self-employed brings him into a more benevolent and less prompt taxation regime. From the employer's point of view, the protection of employee's rights contained in the employment protection

> legislation of the 1970s brought certain perceived disincentives to the employer to take on full-time long term employees. So even in 1986 there were reasons on both sides to avoid the employee label. But, as I have already said, there were, and are good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors.

[35] The second observation the Court of Appeal in *Paul William Lane* made was that the line of authorities indicated that in determining the real relationship between the parties "… there are many factors to be taken into account in answering this question and with different priority given to those facts in different cases, all depends on the facts of each individual case". However, the authorities that were examined yielded the following principles, the first of which is the element of control. This is control in the sense of how, what, when and who is to do the work and this would extend to for instance, the question of who is to provide the equipment, place, machinery, material, tools for the work. The Court of Appeal in *Paul William Lane* went on to opine that the control test is, however:

> … not decisive – for instance, in the case of skilled employees, with discretion to decide how their work should be done. In such cases the question is broadened to whose business was it: was the workman carrying on his own business, or was he carrying on that of his employers? The American Supreme Court, in *United States of America v. Silk* (1946) 331 US 704, asks the question whether the men were employees "as a matter of economic reality". The answer to the question may cover much of the same ground as the control test (such as whether he provides his own equipment and hires his own helpers) but may involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound management in the performance of his task (see *Market Investigations v. Minister of Social Security* (*supra* at page 185)".

[36] The underlying contractual arrangement between the parties is also not the conclusive determinant of the relationship between the respondents. In *Ferguson v. Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213, although the contract between the parties provided that the work was to be classified as "self-employed", the Court of Appeal concluded that "viewed holistically, the relationship was one of employer/employee. The expressed intention of the defendants was a mere device to gain tax and national insurance advantages."

[37] This then brings up the other argument frequently raised and which is raised too, in the instant appeal, that medical professionals such as the instant tortfeasor are independent contractors because they are engaged in contracts for service and not contracts of service; hence the hospital is not vicariously liable. In contracts of service, the "master" not only can require the work to be done but how the work is to be done. This test necessarily examines

the question of control. The second respondent asserts that it cannot tell the first respondent how he is to manage, treat and care for Catherine as that falls entirely within his expertise and professional skill of which the second respondent had no control.

[38] With respect, we disagree. The test for determining whether the contractual arrangements between the two respondents is one for a contract of service or a contract for services by analysing the degree and extent of control has also been found to be in itself indecisive and inadequate especially when it comes to professionals with some particular skill and experience. In such cases, "there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test", per Cooke J in *Market Investigations v. Minister of Social Security* [1969] 2 QB 173, 183. Cooke J further opined:

> Cases such as *Morren*'s case [1965] 1 WLR 576 illustrate how a contract of service may exist even though the control does not extend to prescribing how the work shall be done. On the other hand, there may be cases when one engages another to do work may reserve to himself full control over how the work is to be done, but nevertheless the contract is not a contract of service. A good example is *Queensland Stations Proprietary Ltd v. Federal Commissioner of Taxation* (1945) 70 CLR 539 ...

[39] The approach taken in *Market Investigations v. Minister of Social Security* was adopted in the Privy Council decision of *Lee Ting Sang v. Chung Chi-Keung & Another* [1990] 2 AC 374. In that decision, the Privy Council agreed that "… control will no doubt always have to be considered. Although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of that task". Using that test or the various *indicia*, the Privy Council found from the facts that "… the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks …." The Privy Council allowed the appeal, concluding that the facts pointed "so clearly to the existence of a contract of service that the finding that the applicant was working as an independent contractor was, to quote the words of Viscount Simonds in *Edwards v. Bairstow* [1956] AC 14, 29, 'a view of the facts which could not reasonably be entertained' and is to be regarded as an error of law'.

[40] In *Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st edn p. 384 – paras. 6-012), the writers point out that ultimately, there is no "single or universal test" that determines the existence of an employer/employee

relationship although the "multiple test" is advocated as "the more modern approach". In the multiple test, "all aspects of the relationship are to be assessed and the assessment itself is seen as a complex undertaking. In essence, some of the case law has underlined the need to identify the economic reality of a given relationship".

[41] Support for this approach can be found in *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 DLR 161 which proposed a four-fold test based on control, ownership of tools, chance of profit and the risk of loss; and *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497, one of the authorities examined in *Paul William Lane* and cited too, in *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor* as propounding the "common sense approach". While these principles were discussed and evolved in the context of construction contracts, they are equally applicable in the context of medical negligence and the accountability of hospitals for the various persons and personnel who staff the hospitals and who go towards ensuring that hospitals function and operate as they are meant to; which is to provide *inter alia* health care.

[42] When it comes to hospitals, especially a private one, it was generally assumed that hospitals or the hospital entities themselves are not liable vicariously for the negligence of the doctors, specialists and consultants and even the nurses (because they act according to the instructions of the doctors, specialists, consultants and the like) who treat, manage and take care of the patients admitted at or to the hospital because such professional staff are independent contractors. This assumption has led to the proposition of various tests in order to determine vicarious liability for these independent contractors, as illustrated in the case of *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu* (*supra*).

[43] The writers, *Jackson & Powell on Professional Negligence* (Sweet & Maxwell 5th edn 2002) at paras. 12-250 describe this assumption that medical professionals are necessarily independent contractors as a "heresy" which can be traced back to the cases of *Evans v. Liverpool Corporation* [1906] 1 KB 160 and *Hillyer v. Governors of St Bartholomew's Hospital* [1909] 2 KB 820. The writers opined that while the *ratio* in *Hillyer*'s case has been a "source of considerable debate amongst legal writers" since Farwell and Kennedy LJJ gave different reasons for their decision, the *ratio* appears "to be that hospital authorities were only liable for the performance by their staff of purely ministerial or administrative duties, such as, for example, attendance of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food and the like." They were not liable for the negligence of professional staff, such as doctors, surgeons and anaesthetists in the performance of their duties."

[44] *Hillyer*'s case was followed in *Strangeways-Lesmere v. Clayton* [1936] 2 KB 11 and *Marshall v. Lindsey County Council* [1935] 1 KB 516 (CA) and [1937] AC 97. But, in the case of *Gold v. Essex County Council* [1942] 2 KB

293, the Court of Appeal declined to follow *Hillyer*'s case, ruling that it "should be restricted to what it actually decided; namely, that when a nurse in an operating theatre did something by the direction of the surgeon which resulted in injury to the patient, the governors were not liable for the act of the nurse."

[45] In *Gold v. Essex County Council*, the court found the hospital liable for the radiographer's failure to properly protect the patient before applying Grenz rays with the result that the patient became permanently disfigured. The opening remarks by Lord Greene MR are significant; after pointing out that the plaintiff had made a small payment to the defendant for his treatment of the plaintiff, His Lordship indicated that he would "attach no importance to this, since it would be quite unreasonable to hold the duty owed to a paying patient in such a hospital as thus was greater than that owed to a non-paying patient. The result must, in my opinion the same as it would have been if the treatment had been gratuitous." The hospital authority is itself under a duty to its patients which it does not discharge simply by delegating its performance to someone else, whether the delegation is to an employee or an independent contractor. On this basis, it makes no difference whether or not the visiting consultant or professional is a servant – see *Wilsher v. Essex AHA* [1987] QB 730 although the decision was later overturned, not on this issue but that of causation.

[46] From this decision of the Court of Appeal in *Gold v. Essex*, it is said that the vicarious liability of hospitals "gradually enlarged" – see *Jackson & Powell on Professional Negligence*, para. 12-253. In *Collins v. Hertfordshire County Council* [1947] 1 KB 598, it extended to resident junior house surgeon; while in *Cassidy v. Ministry of Health* [1951] 2 KB 343, the Court of Appeal found the hospital vicariously liable for all medical staff who treated the claimant during and after the operation. Therefore, the position in the UK is not to readily accept the label of "independent contractor" to the tortfeasor without examining the real underlying relationship between that tortfeasor and the hospital.

[47] What then, is the position in Malaysia? Learned counsel for the respondent has urged upon us that the law is as propounded in *Tan Eng Siew & Anor (supra)*; and in *Foong Yeen Keng v. Assunta Hospital (M) Sdn Bhd & Anor* [2006] 1 CLJ 608 and *Wu Siew Yong v. Pulau Pinang Clinic Sdn Bhd & Anor* [2011] 1 CLJ 255.

[48] The decision in *Tan Eng Siew & Anor* (*supra*) has already been discussed. On the facts, the existence of a special relationship was not established. As for *Foong Yeen Keng*'s case, with respect, we must disagree with learned counsel that it is authority for his proposition. In that decision, the issue of non-vicarious liability was not raised. What was actually contested was the issue of negligence itself, that the hospital, through its servants and/or agents, was not negligent in the management of the two

operations that the appellant underwent; and neither was it negligent in the post-operation management of the appellant. The High Court affirmed the decision of the lower court that had dismissed the claim against the hospital.

[49] The decision in *Wu Siew Yong v. Pulau Pinang Clinic Sdn Bhd & Anor* has to be treated with caution as the decision on the hospital's liability was made for the sake of completeness and after the court had already found the doctor not to be negligent in the treatment and care of the plaintiff. There, the learned judge examined the agreement between the hospital and the doctor before concluding that there was no special relationship between them. Amongst the reasons given was the finding that the negligent act and wrongful act complained of were acts in relation to the personal acts of the doctor in the treatment, management and care of the plaintiff which the doctor retained full control. Consequently, the hospital was not vicariously liable.

[50] From the line of authorities, we are of the view that this considerable question of whether a private hospital is vicariously liable for the negligence of its doctors, consultants or nurses, that is, the tortfeasor, is to be determined by investigating and evaluating whether such persons are truly independent contractors or they are, for all intents and purposes, still employees or in special relationships with the hospital. This evaluation involves mixed questions of fact and law for which we find that the multiple test or common sense approach as the most appropriate test. This test of various *indicia* (see *Lee Ting Sang v. Chung Chi-Keung*, *supra*, at p. 383) acknowledges the relevance of other factors such as the way business arrangements are drawn-up especially in the running of hospitals and the provision of healthcare and health services. The modern day economic reality in the provision of healthcare has seen the role no longer the single responsibility or domain of public hospitals run and supported by public funds. Healthcare is now hugely augmented by the presence of private hospitals such as the second respondent, who are in the position to offer supposedly better and perhaps wider range of healthcare and healthcare services. Other than the obvious difference in physical conditions of the hospitals, private hospitals are, to a large extent still staffed by the same and usual range of doctors and nurses, of different levels of expertise and types of specialisation. While the contractual arrangements of the doctors and nurses in public hospitals are generally governed by terms and conditions prescribed under the General Orders, the same cannot be said of the private hospitals. Private hospitals enjoy greater flexibility and have arguably wider options often dictated by business and profit oriented considerations when it comes to how the organisational structure is to be established. Such considerations are not unlike those discussed by Henry LJ in *Paul William Lane*'s case.

[51] This approach was acknowledged in *Tan Eng Siew & Anor* and it would be fair to say also by the Federal Court in *Wu Siew Ying v. Gunung Tunggal Quarry & Construction*. In the Federal Court's decision of *Wu Siew Ying*

v. Gunung Tunggal Quarry & Construction, the Federal Court recognised that an employer may still be vicariously liable for the negligence of its independent contractors if there was evidence to suggest that to be the case. Vicarious liability is established not by reason of the employer/employee relationship alone; it may exist because of the special relationship between the two parties which renders the first party accountable for the other tortfeasor's negligence. In determining the existence of that special relationship, the multiple test which is very much fact and context driven, would best serve the ends of justice, lifting and sieving through the various layers of bureaucracy and business arrangements in modern society in order to determine exactly who is in charge.

[52] In the present appeal, the learned judge examined the agreement dated 12 May 2001 made between the two respondents before concluding that the second respondent was not vicariously liable for the first respondent as it was provided therein that the first respondent was an independent contractor; and that the first respondent had admitted as much in evidence. As we have seen, the labels attached to the relationship do not *ipso facto* determine the nature of the relationship or the capacity of the parties in relation to one another and, more importantly, to third parties. This is what the underlying arrangement was between the two respondents in relation to the management, treatment and care of Catherine.

[53] The parties entered into two agreements, a consultant agreement dated 26 June 1996 and a resident consultant agreement with use of suite dated 12 May 2001, the latter superseding the earlier and it is found at pp. 2181 to 2197 of the record of appeal. Under the earlier agreement, the first respondent was "given the right to conduct specialised medical services, diagnostic and treatment at the hospital according to the terms and conditions therein". Under the second agreement (agreement), the parties agreed that the first respondent was to continue to enjoy those rights with the second respondent providing the "use of a suite and hospital privileges". The privileges are spelt out at cl. 5. The privileges comprise rights, licences and privileges to the first respondent to "carry on his profession as a consulting medical specialist in the discipline he is specialised in the manner that will promote the image and standing of the consultant and the said hospital which shall not be exclusive not limited to him alone." Other privileges include the right of exclusive occupation of all areas forming the suite, and the right to use the facilities of the second respondent. In the use of the suite, the first respondent was provided with a receptionist, housekeeping services, basic amenities, provision of telephone lines and a reserved parking bay. The first respondent also enjoys medical benefits for himself, spouse and children below the age of 18 while his extended family enjoy certain discounts on treatment and services at the second respondent hospital – see cl. 8.5.

[54] Under the agreement, the first respondent is required to pay for all these rights and privileges: a refundable practising rights fee (cl. 4), rental charges (cl. 5.2.1); and payment for hospital privileges (cl. 5.2.2). The payment for hospital charges are based on the earnings of the first respondent and it is payable as follow:

> … bi-monthly sums which may be deducted from the Consultant's recorded earnings collected by the Hospital on this behalf for inpatient and outpatient services provided by him at the Hospital in respect of the first half of every month on the 22nd Day of the relevant month and in respect of the second half of the month, on the 7th Day of the subsequent month calculated at the rate of ten percent (10%) of the Consultant's earning for inpatient and five percent (5%) on outpatient services.
>
> In the event of partial collection, the collected amount shall be divided into a pro-rata basis between the Consultant and the Hospital with each party taking a proportionate amount of its entitlement.
>
> Where there are other charges such as credit card charges, the Consultant and the Hospital shall bear the expenses on a pro-rata basis.

[55] From the terms and conditions of the agreement, the first respondent is further required to:

(i) use the 'investigative, therapeutic, surgical, pharmaceutical and other services available at the hospital pursuant to this agreement. In the event that such service are not obtainable at the hospital for any reason whatsoever, the consultant shall undertake to procure the same through the hospital – cl. 6.1;

(ii) fill prescription at the hospital pharmacy; that is, to recommend all drugs proscribed by him to his patients to be filled at the hospital pharmacy – cl. 6.2;

(iii) should there be a need for admission, to admit his patients to the hospital – cl. 6.4;

(iv) not charge his patients any fee in excess of or less than the fee schedule made up from time to time by the Malaysian Medical Association and as adopted by the management of the hospital and the consultant by mutual consent – cl. 6.5;

(v) charge his inpatients and outpatients at the hospital for any professional services through the hospital only – cl. 6.5.

[56] The significance and fundamentality of some of these obligations is reflected in the consequences of non-compliance. For instance, cl. 6.2 provides that the obligation of the first respondent to fill all prescriptions at the second respondent's pharmacy is both strict and mandatory "the failure of which shall be tantamount to a breach of this agreement hereby entitling the non-defaulting party to terminate this agreement pursuant to cl. 10 hereafter". The first respondent "is prohibited from selling any drugs

A including sample drugs to his patients at his suite or hospital, nor shall he sell drugs to such patient at places outside the hospital." Clause 6.5 allows the second respondent to "take into its possession any drugs dispensed or stored by the consultant for the purpose of dispensing to patients in breach of this clause and for this purpose the consultant expressly consents to B periodic inspections of the suite, including any fixtures or fittings, at any time without notice by representatives of the company provided there is reasonable ground for the inspection and in the presence of the consultant."

[57] Under cl. 6.6, the first respondent is further required to "immediately account to the hospital, for all monies received by him from his patients seen C at the hospital, including any deposit and down payment." The "recorded earnings of the consultant collected by the hospital on his behalf for inpatient and outpatient services over the duration of his serves shall be used as a measurement in the assessment of the consultant's productivity which level shall be reasonable and acceptable to the management of the hospital" – see D cl. 6.10.1.

[58] In addition to all these obligations, the first respondent is required to:

(i) have due regard, observe and conform to directives, policies, procedures, medical staff by-laws, rules and regulations as may be issued E and/or amended from time to time by the management of hospital regardless of the manner it was communicated so long as it was communicated as being applicable to the consultant – cl. 6.7.2;

(ii) be on call duty as decided by the second respondent – cl. 6.8;

(iii) maintain his presence and devote his time and attention at the hospital F during normal working hours unless otherwise exempted in writing by the management of the hospital – cl. 6.10.

[59] Insofar as his leave is concerned, the first respondent enjoys leave up to thirty days in any calendar year. He, however has to inform the medical director for such leave. But, in the case of leave above thirty days, the G first respondent is required to obtain the board of director's approval and this is *via* consultation with the medical director. During his leave or absence of more than three days duration (including when he is on medical leave), the first respondent is required to appoint a locum.

H **[60]** At cl. 7.7 of the agreement, the first respondent has also covenanted that "he shall, in the discharge of his professional duties work in the best interest of the patient and hospital and shall at all times, secure and maintain a high standard of medical efficacy and ethics." In the event of failure or breach of such representation or warranty, the second respondent is entitled to terminate the agreement.

I **[61]** All these terms and conditions amply indicate the existence of a special relationship between the respondents. The picture emerges of a skilled and professional medical practitioner in the person of the first

respondent (and those who operate under his instructions) who is not truly independent of the second respondent. These terms and conditions show that the second respondent remains always in control of the first respondent; that it provided not just the place, materials or medication/prescription, staff and tools for the first respondent to render his management, treatment and care of Catherine, it was mandatory for the first respondent to treat, manage and care for Catherine at the second respondent hospital. If the first respondent had considered otherwise, he would be in breach of the agreement and the second respondent would be entitled to terminate the agreement. Further, the profits (from the records of earnings of the first respondent) and risks were shared between the respondents.

[62] Quite clearly and contrary to the claims of the respondents, the first respondent is not at all, an independent contractor; there exists a special relationship between the two respondents to establish vicarious liability. The second respondent is also not a mere landlord tenanting the suite to the first respondent and being paid monthly rentals. As we can see from the terms and conditions of the agreement, their relationship is a lot more.

[63] Given this overwhelming evidence as found in the record of appeal, we find that the learned judge was clearly erroneous in her conclusions that the first respondent was an independent contractor, and that the second respondent was not vicariously liable for the first respondent's negligence. The first respondent was not engaged as an independent contractor or on a contract of service where there was no element of control whatsoever exerted by the second respondent. As can be seen, the agreement is replete with evidence of the first respondent, no doubt a medical professional, in quite a special relationship with the second respondent, and is in fact very much part and parcel of the second respondent as per Denning LJ in *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 QB 248, 295 where His Lordship held:

> The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.

[64] We further agree with the submissions of learned counsel for the appellant that by reason of the same holding out and assurance given in exh. D11, the second respondent is vicariously liable for the negligence of the first respondent.

[65] The above approach was adopted by Abdul Rahman Sebli J (as His Lordship then was) in *Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & Ors* [2011] 1 LNS 33; [2011] 2 AMR 742. In this case, the plaintiff fractured his femur and after going to two hospitals run by the Government, he went to the hospital run by Sabah Medical Centre Sdn Bhd (SMC). At SMC, one Dr Heng who advised surgery saw him. Surgery was subsequently done. After surgery, the plaintiff complained of persistent pain in his right hip especially on movement of the hip. He was prescribed painkillers by Dr

Heng. The fracture eventually became displaced and the plaintiff underwent a second surgery, this time in Ipoh and this was *inter alia* to remove the screws inserted by Dr Heng. Although the fracture united, the right hip showed signs of degeneration. At the time of his claim, the plaintiff suffered several disabilities including severe advanced degenerative arthritis of the hip, shortened right leg and had to undergo artificial hip replacement surgery.

[66] After a full trial, Abdul Rahman Sebli J found the plaintiff's claim against Dr Heng proved on a balance of probabilities. His Lordship further found SMC vicariously liable for Dr Heng's negligence, rejecting SMC's defence that Dr Heng was not its servant, employee or agent (which was admitted by Dr Heng); and rejecting too, the defence that Dr Heng was an independent contractor. After evaluating the circumstances and representations at the time of admission to SMC, and the contractual arrangements between Dr Heng and SMC (in particular the resident consultant's agreement or RCA), and applying the tests of control set out in *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu (supra)*, His Lordship concluded that it was a "misnomer" to describe Dr Heng as an "independent contractor"; and that it was "untenable" for SMC to argue that it was not vicariously liable for Dr Heng's negligence. At cl. 6 of the RCA, it was stated that:

> The consultant's relationship with the company shall be that of an independent contractor and not as servant/employee or agent.

[67] It was His Lordship's view that the terms of the RCA cannot bind the plaintiff given that the plaintiff was not a party to it. In fact, rhetorically, His Lordship asked:

> … Further, one may ask the question, why should the plaintiff be concerned with what agreement SMC had with Dr Heng? And why should the plaintiff be bound by clause 6 which was inserted by SMC for the specific purpose of denying a patient like him a remedy against the hospital?
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> [60] When the plaintiff came to SMC for treatment he expected SMC to provide the treatment. He did not choose Dr Heng to be his doctor. Neither was it his concern that Dr Heng had some special arrangements with SMC. He would not even know which doctor SMC would assign to attend to his injuries.
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> [61] A medical institution like SMC has a duty to ensure that doctors who practice at the hospital whether employed by them or otherwise have the necessary skill and competency to treat patients. It is no defence for SMC to say that it is not responsible for the wrongdoings of its "independent contractors" if otherwise these doctors were allowed by SMC to run their practice at the hospital. Neither does it lie in the mouth of SMC to say, through the testimony of DW3 that:
>
> The consultant is responsible for the medical treatment or advice given by the third defendant to the plaintiff and SMC.

> [62] From the patient's point of view it is SMC that provides the medical services and not any individual doctor plying their trade at the hospital. SMC cannot allow doctors to practice at the hospital but at the same time unwilling to accept responsibility for their wrongdoings. There is no signboard at SMC's entrance which says in bold "TREATMENT IS AT YOUR OWN RISK". SMC's remedy if at all lies in claiming contribution from the doctors if they are found to be negligent and not by denying patients of their rightful claims under cover of clause 6 of the RCA.

[68] On further examination of the RCA, His Lordship found more evidence of control exercised by SMC over Dr Heng to hold SMC vicariously liable for Dr Heng's negligence. Amongst which was the control of the fee structure which Dr Heng could charge the patients and the requirement that Dr Heng was to exercise his practice with diligence. In fact, the court found Dr Heng to be in "constructive employment" with SMC.

[69] On the question of whether Dr Heng was an agent of SMC, His Lordship said:

> [69] It is true that Dr Heng is not an employee of SMC in the sense that there is no contract of employment between them. But the truth is Dr Heng was for all intents and purposes and at all material times representing SMC when he gave treatment to the plaintiff. SMC is not owned by Dr Heng and he was not operating his own clinic there although cl. 10 of the RCA under the heading "clinic facilities" uses the words "to run his clinic" in reference to Dr Heng. The plaintiff would not have ended up being trerated by Dr Heng if he had not gone to SMC for treatment. He went to seek treatment by SMC and not by Dr Heng in particular.

[70] At para. 71, His Lordship concluded in fairly strong and clear terms to say:

> As a doctor having contractual relationship with SMC on SMC's terms and allowed to run his practice at the hospital it is a long shot to suggest that Dr Heng acted independently of SMC in dealings with the plaintiff.

[71] Another important point that was overlooked by the learned judge was the position of the second respondent under the Private Hospitals Act 1971 (Act 43). Under the agreement, the second respondent is described as a company established under the Companies Act 1965 and that it owns the hospital within the meaning of the Private Hospitals Act 1971 (Act 43). Act 43 has since been repealed; it is now replaced by the Private Healthcare Facilities and Services Act 1998 (Act 586). The second respondent's hospital is now more appropriately described as a "healthcare facility". Under s. 2 of Act 586, "healthcare facility" means any premises in which one or more members of the public receive healthcare services. The term "healthcare services" is defined as including:

> (a) medical, dental, nursing, midwifery, allied health, pharmacy, and ambulance services and any other service provided by a healthcare professional;

A (b) accommodation for the purpose of any service provided under this Act;

(c) any service for the screening, diagnosis, or treatment of persons suffering from, or believed to be suffering from, any disease, injury or disability of mind or body;

B (d) any service for preventive or promotive health purposes;

(e) any service provided by any healthcare para-professional;

(f) any service for curing or alleviating any abnormal condition of the human body by the application of any apparatus, equipment, instrument or device or any other medical technology; or

C (g) any health-related services;

[72] The term "healthcare professional" is defined as including "a medical practitioner, dental practitioner, pharmacist, clinical psychologist, nurse, midwife, medical assistant, physiotherapist, occupational therapist and other D allied healthcare professional and any other person involved in the giving of medical, health, dental, pharmaceutical or any other healthcare services under the jurisdiction of the Ministry of Health".

[73] It is undeniable that in law, the second respondent is not a mere building or an ordinary company incorporated under the Companies Act E 1965; or even a landlord; it is a healthcare facility where healthcare services regulated by and under the law, are provided to members of the public and to persons such as Catherine and the appellants. Any business arrangements that it structures to operate or best earn profits or even enable it to be a successful corporate sole, are of no relevance when it comes to the question F of accountability and liability in law for the business of healthcare services. That core business that the second respondent proffers can only be rendered through healthcare professionals such as the first respondent, the medical officer and the nurses in the instant appeal. Under such circumstances, the second respondent owes a duty of care to the clients or patients with whom G the second respondent accepts and agrees to provide healthcare.

[74] All these pieces of evidence and principles of law were not properly and adequately appreciated by the learned judge; consequently, there has been a misapplication of the law to the facts which requires intervention by this court.

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[75] Since the first respondent has been found to be negligent, and there is no appeal by any of the parties, with the above conclusions, we find that the second respondent is vicariously liable for the first respondent's negligence. We must add that these conclusions are not and cannot be affected by the fact that Dr Ruby, the GP had referred Catherine into the care of the first I respondent. As observed in *Gold v. Essex County Council*, the liability of the hospital cannot be affected by whether the patient was fee paying or was

admitted under the National Health Service scheme; or in our case, by whether the hospital is a Government healthcare facility or a private healthcare facility. The position remains the same given that the primary function is the same.

[76] We further find that the second respondent, as a hospital or healthcare facility or services provider, owes a duty to all the patients who attend or are admitted into its care. That duty is not discharged simply by delegating its performance to someone else, whether the delegation is to an employee or an independent contractor. It is a non-delegable duty of care – see *Clerk & Lindsell on Torts* (Sweet & Maxwell) 21st edn p. 380, para. 6-02); *Woodland v. Essex County Council* [2014] 1 All ER 482; *Various Claimants v. Catholic Child Welfare Society & Others* [2013] 1 All ER 670.

[77] This principle was adopted in two recent decisions of the Court of Appeal: *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2015] 1 LNS 1476; and *Soo Cheng Lin v. Dr Kok Choong Seng & Anor And Another Appeal* [2016] 8 CLJ 368. In both appeals, a similar question of whether hospitals are vicariously liable for the negligence of the doctors arose. In both decisions, the issue was answered in the affirmative based on the principle of non-delegable duty of care.

[78] In dismissing the appeals of the hospital, the Court of Appeal in *Dr Hari Krishnan & Anor* described the relationship between the hospital and the doctor as one which is "inextricable", and that the liability of the hospital for the negligence of doctors cannot be absolved by "mere internal arrangement". Rohana Yusuf JCA opined:

> [58] In our view, Hospital is an institution that provides medical service and treatment to sick patients. Such services can only be given by doctors, nurses and other support staffs. A hospital cannot exist without doctors. The learned JC was correct to say that whatever arrangement entered between the doctors and the hospital, is purely internal. The negligence of doctors cannot absolve the liability of the hospital by mere internal arrangement. When a person presents himself at the hospital for treatment he is seeking treatment from that hospital, knowing that the service would be provided through a doctor or someone at the hospital. A hospital on the other hand is nothing but a provider of medical care and services and would never exist independently without the service provider such as doctors and nurses. The relationship between doctors and the hospital is inextricable.

[79] The Court of Appeal rejected the submission of the hospital that the doctors were independent contractors and not its employees citing RK Bag on the "*Law in Medical Negligence and Compensation*" (2nd edn) and Andrew Grubb on "*Medical Law*" (3rd edn, 2000 at p. 298) which had referred to an extract from yet another author, Picard on "*The Liability of Hospitals in Common Law Canada*". The authors described the duties owed by hospitals to their patients as "non-delegable":

> The quality of the duties owed by a hospital has led to their sometimes being referred to as 'non-delegable'. This has the significant effect of making the employer of an independent contractor strictly liable for any negligence of the contractor in carrying out the duty of care which was the employer's but which he had contracted or delegated to the independent contractor. This is an exception to the general rule that an employer is not liable for the negligence of an independent contractor employed by him.

[80] The Court of Appeal went on to add:

> [61] In our view in the admission of a patient, a hospital must be regarded as giving an undertaking that it would take reasonable care to provide for his medical needs. There is an overriding and continuing duty upon hospital as an organisation, to provide the services to its patients. The hospital cannot be mere custodial institution to provide a place where medical personnel meet and treat patients (see *Ellis v. Wallsend District Hospital* (1989) 17 NSWLR 553).

[81] The decisions of *Dr Wong Wai Ping & Anor v. Woon Lin Sing & Ors* [1999] 6 CLJ 23, *Roe v. Minister of Health* [1954] 2 QB 66 and *Cassidy v. Ministry of Health* (*supra*) were cited in further support by the Court of Appeal. The hospitals remain vicariously liable for the negligent act of the doctor despite any internal contractual arrangements to the contrary. This is because "A patient knows nothing of the terms on which a hospital employed its staff. A patient only knows that he was treated in a hospital by people whom the hospital authorities appointed for which the hospital authorities must be answerable for the way in which he was treated."

[82] It would appear that the Court of Appeal in *Dr Hari Krishnan & Anor* applied this principle of non-delegable duty of care because of the patient or customer's position of vulnerability or dependence on the hospital, a position similarly adopted in *Chai Beng Hock*.

[83] In *Soo Cheng Lin v. Dr Kok Choong Seng & Anor And Another Appeal* (*supra*), the Court of Appeal was specifically invited to recognise and apply the principle of non-delegable duty of care owed by hospitals to their patients. The learned judge in the High Court in that case had rationalised her finding that a hospital is liable for the negligence of its doctor on the basis that the hospital owed a non-delegable duty of care and on policy considerations. After examining several local competing decisions on this principle, David Wong JCA observed that:

> ... there appears to be conflicting views as to whether a private hospital ... should be vicariously liable for the negligence of an independent consultant/doctor ... One line of authorities is premised on the principle of law that the private hospital should not be held liable for negligence of the independent consultant/doctor when there is no control of the conduct of the same by the private hospital. The other line of authorities is premised on the principle of law that despite the independence of the consultant/doctor and lack of complete control by the private hospital, a

duty of care is imposed on the private hospital and there has been an assumption of responsibility by the same and that responsibility cannot be delegated.

[84] The Court of Appeal resolved to apply the principle of non-delegable duty of care after examining the principle as described by Mason J in the High Court of Australia in *Kondis v. State Transport Authority* (1984) 55 ALR 225; and by Sumption SCJ in *Woodland v. Essex County Council* [2013] 1 All ER 670. Mason J opined that from the classes of cases in which the existence of a non-delegable duty has been recognised, "it appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed … The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care … In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so places in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person might reasonably expect that due care will be exercised."

[85] In *Woodland v. Essex County Council* (*supra*) Lord Sumption opined that:

> 6. English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why. There are, however, two broad categories of case in which such a duty has been held to arise. The first is a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work…
>
> 7. The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty upon the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock)…

> 8. This characterisation of non-delegable duties originated in the law of nuisance … It was implicit in the famous judgment of the Exchequer Chamber in *Rylands v. Fletcher* (1866) LR 1 Ex 265, delivered by Blackburn J and subsequently affirmed by the House of Lords (1868) LR 3 HL 330, that the duty of the defendant to prevent the escape of water from his reservoir was non-delegable, for on the facts it was due to the operations of an independent contractor.
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> …
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> 11. The duty to which Lord Blackburn was referring would today be regarded as arising from an assumption of responsibility imputed to the defendant by virtue of the special character of his relationship with the claimant.

[86] Lord Sumption further opined that "the expression "non-delegable duty" has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others;" the ordinary principle being that personal as opposed to vicarious liability is not imposed for what others do or fail to do. While not prepared to subscribe to every *dictum* in the Australian cases, His Lordship was nevertheless prepared to define the features that would characterise the cases where such a non-delegable duty of care may be imposed:

> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury…
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant; and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another…
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> (3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.
>
> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
>
> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[87] In adopting the approach above for the reasons given by Lord Sumption, and bearing in mind that "a non-delegable duty of care should only be assigned … if it is "fair, just and reasonable" to do so," David Wong JCA held that "[58] … we see no reason why our jurisdiction should not adopt the jurisprudence of non-delegable duty expounded in that case. The development of our common law lies squarely in the hands of the courts and if the time which we live in demands such adoption we must do so. There is little doubt in recent years that the development of private health service providers in Malaysia has grown in leaps and bounds. And these private health service providers are in stiff competition among themselves to attract patients to patronise their hospitals. And they so on the obvious premise that they provide the best care with the most competent doctors and nurses." It was the view of the Court of Appeal that once a patient is admitted as a patient of the doctor in the private hospital, as was the position in that appeal, the patient is also a patient of the hospital. In that relationship, the patient is thereby "vulnerable and/or dependent on the protection of the hospital against the risk of injury." The Court of Appeal found no difficulty in imputing to the hospital, a health service provider, an assumption of a positive duty to protect the patient from harm. Consequently, the hospital was liable for the negligence of the doctor.

[88] We can do no better than to adopt the approach taken and echo the views expressed in the above cases though we must expressly say that it is not on policy considerations. There is abundant evidence and principle to show the existence of a non-delegable duty of care on the part of the second respondent and more importantly, of the second respondent's extensive control on the first respondent. Although Catherine was referred to the first respondent, it was the first respondent practising out of the second respondent hospital. The first respondent could not treat, manage or care for Catherine anywhere but at the second respondent. Like the plaintiff in *Chai Beng Hock v. Sabah Medical Centre Sdn Bhd & Ors*, neither Catherine nor any of the appellants could be expected in any reasonable and accountable sense to know of the terms of engagement between the two respondents. But, unlike the facts in *Chai Beng Hock*, there were clear representations by the second respondent as to the services and facilities that the second respondent was offering to any of its clients, of whom Catherine and her husband certainly and without doubt were. The matters alluded to at para. 11 herein have indeed been established by the appellants and their claim ought to have been allowed, but it was erroneously dismissed. The moment Catherine was admitted as a patient of the first respondent, she became a patient of the second respondent, vulnerable and dependent on the second respondent to protect her from risk of injury or harm. By admitting Catherine through its doors and into its facility to be provided the services of the first respondent and the other attending nurses which the first respondent was obligated and mandated to use, the second respondent had assumed a positive duty of care

to protect Catherine from harm and the risk of injury. Hence, when the first respondent breached that duty and injury or harm was caused to Catherine, the second respondent remains liable.

[89] For all these reasons, we can only conclude that the learned judge's findings of "the existence of a contract of service … that the applicant was working as an independent contractor" cannot reasonably be entertained and is indeed, an error of law. The evidence, on the contrary, more than indicate that the first respondent was very "part and parcel of the organisation" of the second respondent.

[90] Consequently, we find that the second respondent remains vicariously liable for the negligence of the first respondent. The appeal is accordingly allowed against the second respondent, the decision of the High Court on the second respondent is set aside and judgment is entered against the second respondent.

Quantum

[91] In this appeal, the appellants are only pursuing their dissatisfaction with two aspects of the learned judge's award on quantum: the appellants' claims for loss of contribution or loss of support; and the failure of the learned judge to award pre-judgment interest.

[92] Insofar as the claim for loss of support of RM518,786.40 is concerned, this was a claim for the loss of Catherine's contribution to supporting the appellants, especially the children. Catherine's ability to support the appellants financially was derived from her total earnings of RM12,808.05 per month that she earned as a teacher/senior assistant, and from the private tuitions that she gave. This contribution was rejected by the learned judge because SP1 (Catherine's husband/first appellant) testified that the family used his total income each month for their needs. That left Catherine's income unused. Almost the entire of Catherine's income was saved in their joint account. In dismissing the claim for this loss, the learned judge relied on the Federal Court's decision in *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] 1 LNS 61; [1975] 1 MLJ 119.

[93] Learned counsel for the appellants submitted that the learned judge had erred because she merely considered the fact that Catherine's income was saved, and not what it was saved for. The learned judge had failed to consider that Catherine's income was in fact saved to pay for the children's education.

[94] We agree with the appellants that the learned judge had fallen into error when she disallowed this head of claim. The learned judge had ignored material evidence on how support was shared and given between the first appellant and Catherine. SP1 had testified that he and Catherine had pooled both their resources including their salaries together to pay for the household expenses. The balance of the monies, which were largely Catherine's income was saved for their children's education locally and overseas. In other words, there was support from Catherine.

[95] Compensation for loss of support is compensation for the support given by the deceased, Catherine rendered in the form of money or money's worth. The typical support would be the food on the table, payment for accommodation, utilities, care, transport, comfort and even holidays. Support for the children's education is yet another aspect or form of support that is claimable. That support may be spent immediately, paid in advance or put aside for use at a later date; it depends on how the claimants have arranged their affairs. In computing the loss of support, s. 7(3)(iv)(c) of the Civil Law Act 1956 requires the deduction of the amount that the deceased or Catherine spent on herself, that sum being her living expenses. The appellants conceded that Catherine's living expenses was a sum of RM2,000 per month leaving the multiplicand at the sum of RM10,808.05. With a multiplier of four years, the total loss of support is RM518,786.40. To this sum, a tax deduction of 20% ought to be made. This sum is awarded together with interest at the rate of 5% per annum from the date of judgment to the date of realisation.

[96] Finally, on the matter of pre-judgment interest. The learned judge did not order any interest to be payable on the award of special damages in the sum of RM180,720.35. The complaint here is following the decision in *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156, pre-judgment interest ought to have been awarded as the appellants are actually entitled to such interest.

[97] We agree with the submissions of the appellants. The trial court ought to have ordered interest on the award of special damages given that this compensation is in effect for out of pocket expenses or expenses already expended by the appellants. The award of interest addresses that element of compensation. Consequently, we order that interest at the rate of 4% per annum be imposed on the sum of RM180,720.35 from the date of Catherine's death, that is, from 21 March 2012 to the date of judgment.

[98] As for the order of costs, the learned judge had ordered the first respondent to pay the appellants costs of RM60,000 after the court had allowed their claim against the first respondent. In respect of the second respondent, the appellants were ordered to pay the second respondent costs of RM60,000 when their claim against the second respondent was dismissed.

[99] In view of our decision as set out above, we now order each respondent to pay the appellants costs of RM20,000 in respect of this appeal and that both respondents pay the appellants costs of RM60,000 for costs at the High Court. All costs are subject to the payment of allocatur. Deposit to be refunded. Both my learned sister Rohana Yusuf JCA and my learned brother Idrus Harun JCA have read this judgment in draft and have concurred with the same.